

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

<i>In re:</i> MARITIME COMMUNICATIONS/ LAND MOBILE LLC Debtor.	: : : : : : :	CHAPTER 11 CASE NO. 11-13463-NPO
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**MOTION AND REQUEST FOR CERTIFICATION OF DIRECT APPEAL
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**
(Dkt. #s 973, 980, 999; 995, 1017)

Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC, Environmental LLC, Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, “SkyTel”),¹ creditors, objectors, and parties-in-interest² in the above-captioned bankruptcy case (the “Bankruptcy Case”), file this *Motion and Request for Certification of Direct Appeal* (the “Request”) under 28 U.S.C. § 158(d)(2) and Rule 8001(f) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules” or “Rules”), requesting this Court (the “Bankruptcy Court” or “Court”)³ to certify SkyTel’s appeals (collectively, the “Appeals”)⁴ of the following orders for direct appeal to the United States Court of Appeals for the Fifth Circuit (the “Fifth Circuit”): (a) the *Order Confirming Plan of Reorganization* (the “Confirmation Order”)⁵ entered on or about January 11, 2013⁶ by the Honorable David W. Houston, III, which,

¹ The SkyTel entities listed here are separate legal entities managed by Warren Havens, and for the purposes of the Bankruptcy Case and in related proceedings before the Federal Communications Commission, pursue certain common interests.

² See e.g. Claim No. 69; 11 U.S.C. § 1109; Dkt. #685; Dkt. #806.

³ If the subject appeal(s) are docketed in the United States District Court for the Southern District of Mississippi (the “District Court”) prior to the time the Request is acted on by the Bankruptcy Court, SkyTel moves the District Court to act on the Request to the extent the docketing makes the District Court the appropriate Court to so act.

⁴ See Notices of Appeal, Dkt. #s 999, 1017.

⁵ See Confirmation Order, Dkt. #s 973, 980, attached hereto as **Exhibit A**; see also the related bench opinion (the “Bench Opinion”) issued on November 15, 2012, attached hereto as **Exhibit B**. Regarding the Bench Opinion, and the transcript of the two-day confirmation hearing (the “Confirmation Hearing”) from which it came (the “Confirmation Hearing Transcript”), SkyTel has requested numerous

among other things, confirmed the *First Amended Plan of Reorganization* (the “Plan”)⁷ filed in the Bankruptcy Case by the Debtor Maritime Communications/Land Mobile, LLC (the “Debtor” or “Maritime”);⁸ and (b) the *Order Denying SkyTel’s Motion to Exclude Testimony of the Debtor’s Alleged Expert, Robert J. Keller* (the “Keller Order”).⁹ In support of its Request, Skytel states as follows:

INTRODUCTION

1. Under the Communications Act of 1934 (the “FCA”), Congress has directed the Federal Communications Commission (the “FCC” or “Commission”) to license wireless radio spectrum in a manner that furthers the public interest.¹⁰ To that end, Congress has authorized the

corrections be made to that and other transcripts which have been designated as part of the record on appeal (including corrections necessitated by multiple instances of “indiscernible” testimony), but only three such corrections involve the Bench Opinion. *See e.g.* Letter to Veritext, setting forth the requested corrections, a copy of which is attached hereto as **Exhibit C**. The correction process has taken somewhat longer than usual in part because it took longer than expected for SkyTel to obtain the audio files for the subject transcripts. In any event, the requested corrections have either been made or are in progress.

⁶ The Confirmation Order was initially entered on January 11, 2013 as Dkt. # 973, but was missing the last two pages. The completed Confirmation Order was re-entered on January 15, 2013 as Dkt. # 980 (though the date of re-entry is shown as January 11, 2013 on the face of the Pacer docket). Out of an abundance of caution, both docket numbers are referred to in this Request.

⁷ Plan, Dkt. #669.

⁸ The Debtor also filed a *Third Amended Disclosure Statement* (the “Disclosure Statement,” Dkt. #668) in support of the Plan. The proposal of Choctaw Telecommunications, LLC (sometimes referred to herein, collectively with the entities/people related to Choctaw Telecommunications, LLC, as “Choctaw”) (the proposal is referred to as the “Choctaw Proposal”), and the proposal of Council Tree Investors (“CTI”) (referred to as the “CTI Proposal”), are both attached to the Disclosure Statement as exhibits. *See* Dkt. #668, at Exhs. C and D thereto.

⁹ *See* Keller Order, Dkt. #995, attached hereto as **Exhibit D**; *see also* the related arguments and bench opinion issued on November 14, 2012, attached hereto as **Exhibit E**. The Keller Order arose from a motion to exclude certain proposed expert testimony from taking place at the Confirmation Hearing (the “Motion to Exclude,” Dkt. #846). That said, the Motion to Exclude, SkyTel’s related objection to the proposed testimony, and oral arguments in connection therewith, were all heard on the record and ruled on by the Bankruptcy Court during the Confirmation Hearing. SkyTel’s Confirmation Order Appeal therefore includes the issue of whether the Bankruptcy Court erred when it overruled SkyTel’s objection to the proposed testimony. *See* Dkt. #1019; *see also* Dkt. #1031. Accordingly, SkyTel submits that the Confirmation Order Appeal should ultimately be consolidated with the Keller Order Appeal, intends to move for such consolidation at the appropriate time, and has as a result included the Keller Order in this Request.

¹⁰ *See e.g. Thacker v. FCC (In re Magnacom Wireless, LLC)*, 503 F.3d 984, 987 (9th Cir. 2007); 47 U.S.C. § 307.

FCC to award spectrum licenses to qualified candidates “based on a competitive bidding process.”¹¹ The Debtor here is a company which allegedly obtained certain geographic spectrum licenses through such a process (at an auction),¹² and other incumbent or site-based spectrum licenses through a sale/purchase.¹³

2. However, consistent with its duty to promote the public convenience, interest, and necessity,¹⁴ the FCC has implemented a standard policy (the “*Jefferson Radio Policy*”) of revoking or suspending license-assignment rights of radio spectrum licensees who misrepresent their qualifications to the Commission or otherwise exhibit character defects.¹⁵ This is important because the FCC has called this Debtor’s qualifications into question. Indeed, the FCC initiated proceedings against the Debtor to determine, among other things, whether the Debtor “is qualified to be and to remain a Commission licensee,” whether the Commission should revoke any or all of the Debtor’s alleged licenses, and whether certain of the Debtor’s alleged licenses have cancelled or terminated automatically for lack of construction or permanent discontinuance of operation.¹⁶

¹¹ See *Thacker*, 503 F.3d at 987.

¹² See generally Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (FCC 11-64), *In re Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd. 6520, 6523–24 at ¶¶ 9, 12, 13 (2011) (the “HDO”), a redacted copy of which is attached hereto as **Exhibit F**. See also **Exhibit G** hereto, excerpts from Transcript of Deposition of John Reardon Dated September 28, 2012 (the “*Reardon FCC Deposition Transcript*”), at pp. 17:10-11, 183:12-19, 242:16-18; see also **Exhibit H** hereto, excerpts from Vol. I of the “uncorrected” Confirmation Hearing Transcript, at pp. 55:10-17, 82:19-23, 103:5-13.

¹³ See e.g. Reardon FCC Deposition Transcript (Exhibit G), at pp. 17:11-12, 72:1-5, 76:6-14, 81:4-11, 183:12-19; see also Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 52:18-25, 53:1-9, 103:5-13.

¹⁴ See e.g. 47 U.S.C. §307 (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.”).

¹⁵ *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). E.g. *In re Wallerstein*, 1 F.C.C.2d 91 (FCC 1965); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). See also HDO, at ¶ 27, nn. 56, 57.

¹⁶ See HDO, at ¶¶ 1-2, ¶ 61, and p. 28.

3. In part of the FCC proceedings against the Debtor, the FCC Enforcement Bureau (the “EB”) discussed the *Jefferson Radio* Policy in its *Consolidated Opposition to Petitions for Reconsideration* (the “Consolidated Opposition”) in *In Re Maritime Communications/Land Mobile, LCC*, EB Docket No 11-71, filed June 2, 2011,¹⁷ including as follows:

The Commission commenced the above-captioned hearing proceeding with its release of the HDO, in which the Commission found that Maritime’s actions had called into question whether Maritime has the basic qualifications to be a Commission licensee. The Commission found that there are substantial and material questions of fact as to whether Maritime, among other things, violated the designated entity rules and received a bidding credit to which it was not entitled, and repeatedly made misrepresentations to and lacked candor with the Commission. . . .

The Commission’s *Jefferson Radio* policy generally prohibits a licensee whose qualifications to remain a licensee have been set for hearing from assigning or transferring control of the licenses. The premise of the policy is that “a licensee . . . has nothing to assign or transfer unless and until he has established his own qualifications.” This policy serves as a strong deterrent to licensees from engaging in misconduct before the Commission because a licensee would likely suffer an “awesome loss” financially if its licenses were revoked and/or not renewed. As the Commission has observed: “where an evidentiary hearing has been designated on a . . . show cause order to determine disqualification questions, permitting the suspected wrongdoer to evade sanction by transferring his interest or assigning the license without hearing will diminish the deterrent effect which revocation or renewal proceedings should have on broadcast licensees.” In rare circumstances, the Commission has adopted narrow exceptions to the *Jefferson Radio* policy based on compelling public interest considerations.

As explained above, the [Enforcement] Bureau urges that the Commission deviate from its long-established *Jefferson Radio* policy in only the very narrowest of circumstances. . . .

4. In the face of these FCC proceedings, the Debtor filed the Bankruptcy Case and proposed a Plan under which the Debtor intends to attempt to seek FCC approval to transfer certain FCC spectrum licenses which the Debtor claims to own (the “Licenses”) to a third-party

¹⁷ See Consolidated Opposition (available at <http://apps.fcc.gov/ecfs/document/view?id=7021685797>), at ¶¶ 2, 3, 10 (internal citations omitted).

pursuant to an extraordinary exception to the *Jefferson Radio* Policy -- sometimes called *Second Thursday* (an alleged policy or doctrine) -- which has been applied under certain very limited circumstances.¹⁸

5. SkyTel objected to confirmation of the Plan, arguing, among many other things, that the Plan is unfeasible because of the *Jefferson Radio* Policy and the inapplicability of *Second Thursday* in this case, and because, even if *Second Thursday* were applicable, the Licenses cannot in any event be transferred for a variety of reasons, largely based on federal communications law and/or federal anti-trust law.¹⁹ Regardless, the Bankruptcy Court confirmed the Debtor's Plan, and SkyTel timely appealed.²⁰

6. SkyTel now files this Request under 28 U.S.C. § 158(d)(2) and Rule 8001(f), respectfully requesting that this Court certify SkyTel's Appeals of the Confirmation Order and Keller Order²¹ for direct appeal to the Fifth Circuit. Certification is warranted because, among other things:

- a. The Confirmation Order involves questions of law as to which there is no controlling decision of the Fifth Circuit or of the United States Supreme Court:²² specifically, whether a plan of reorganization that provides for the transfer or sale of all or substantially all of the alleged assets of the estate—through the *plan itself*—is actually a sale under § 363(b) or (c) to which § 363(m) applies.
- b. The Confirmation Order involves matters of public importance:²³ specifically, among other things, (i) the case and the issues appealed largely involve the application of federal communications law and/or federal anti-trust to matters arising in the Bankruptcy Case in connection with the Confirmation Order, and

¹⁸ See e.g. Plan, Dkt. #669, at pp. 10, 11, 17, 18; see also Choctaw Proposal, Dkt. #668-5, at pp. 3-4, 8-10; see Disclosure Statement, Dkt. #668, at p. 19.

¹⁹ See generally SkyTel's *Objection to Confirmation of the Debtor's First Amended Plan of Reorganization* ("SkyTel's Objection"), Dkt. # 806 at pp. 32-54.

²⁰ See SkyTel's Notice of Appeal, Dkt. # 999.

²¹ See *supra*, n. 9.

²² 28 U.S.C. § 158(d)(2)(A)(i).

²³ 28 U.S.C. § 158(d)(2)(A)(i).

(ii) the ultimate disposition of the Licenses impacts a vital interest in the community and affects the public at large.²⁴

- c. Finally, an immediate appeal from the Confirmation Order will materially advance the progress of the case.²⁵

JURISDICTION AND VENUE

7. This Court has jurisdiction under 28 U.S.C. §§ 158(a), 158(d), and/or 1334(a). Venue is proper in this Court under 28 U.S.C. §§ 1408 and/or 1409(a).

8. The statutory predicates for the relief sought by SkyTel herein are 28 U.S.C. §§ 158(a) and (d). Relief also is warranted under Bankruptcy Rules 8001 and 8002.

FACTS AND BACKGROUND²⁶

9. In 1981, the FCC established the Automated Maritime Telecommunications System (“AMTS”) as a maritime service that “provide[s] for the unique distress, operational and personal communication needs of vessels at sea and on inland waterways.”²⁷

10. The FCC originally issued “site-based” or “incumbent” AMTS spectrum licenses on essentially a first-come, first-served basis, and, until 2004, all AMTS licenses were site-based.²⁸

11. After 2004, the FCC began awarding “geographic” licenses at public auctions.²⁹ A geographic license grants the licensee exclusive use of specified radio frequencies within a defined geographic area.³⁰

²⁴ 28 U.S.C. § 158 (d)(2)(A)(i).

²⁵ 28 U.S.C. § 158(d)(2)(A)(iii).

²⁶ Some of these facts are provided purely as background, and clearly need not be established for purposes of the resolution of the Request.

²⁷ See Public Notice, 2005 FCC LEXIS 2342, at *2.

²⁸ See Public Notice, 2005 FCC LEXIS 2342, at *3-7; *In re Amend. of the Comm’n R. Concerning Maritime Commc’ns*, 17 FCC Rcd 6685, at *6695-97 (2002).

²⁹ *Id.*

³⁰ *Id.*

12. Because the FCC changed its licensing procedure in 2004, many older site-based licenses cover “co-channel” frequencies also covered by the later-issued geographic licenses. The holder of a geographic license typically has the exclusive right to use the frequencies covered by the subject defined geographic area, except where there is a pre-existing site-based license operating on a co-channel frequency within that same area.³¹

13. The FCC has implemented numerous regulations governing the interaction between the older site-based licenses and the newer geographic licenses.³² For example, 47 C.F.R. § 1.955(a)(2) provides that site-based licenses “automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements.”³³ If a site-based license automatically terminates, the frequencies covered by the terminated site-based license automatically revert to the holder of the geographic license covering that frequency in that geographic area.³⁴

The Licenses at Issue and the HDO

14. The Debtor currently purports to hold both site-based licenses (the “Site-Based Licenses”) and geographic licenses (the “Geographic Licenses”) (collectively, the “Licenses”).³⁵

15. The Debtor allegedly obtained the Site-Based Licenses in 2005 through a purchase of the assets of Mobex Network Services, LLC and its parent company, Mobex

³¹ *In re Amend. of the Comm’n R. Concerning Maritime Commc’ns*, 17 FCC Rcd 6685, at *6699-6704, 6717 (2002); see Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 145-147; see also **Exhibit J** hereto, excerpts from Vol. II of the “uncorrected” Confirmation Hearing Transcript, at p. 43:17-25.

³² See generally 47 C.F.R. §§ 1.955 and 80.49.

³³ 47 C.F.R. § 1.955(a)(2) (citing 47 C.F.R. § 1.946(c)).

³⁴ 47 C.F.R. § 80.385(c).

³⁵ See e.g. Reardon FCC Deposition Transcript (Exhibit G), at p. 17:11-12; Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 103:5-21.

Communications, Inc. (collectively, “Mobex”).³⁶ At least certain of the Site-Based Licenses purport to cover the same “co-channel” frequencies as certain geographic licenses held by SkyTel.³⁷

16. The Debtor obtained the Geographic Licenses in 2005 through an FCC public auction (“Auction 61”).³⁸

17. Prior to Auction 61, the FCC adopted 47 C.F.R. § 1.2110, which provides that certain small businesses meeting certain criteria may qualify as “designated entities.”³⁹ Under FCC rules and regulations, the FCC will award qualified “designated entities” “bidding credits,” which vary depending on the business’s size.⁴⁰ The most advantageous bidding credit gives the applicant a 35% “payment discount” on its bids, and is reserved for very small businesses, which are those that have “average gross revenues for the preceding . . . 3 years not exceeding \$ 3 million. . . .”⁴¹

18. In 2005, the FCC announced the auction of ten (10) geographic licenses via Auction 61,⁴² and the Debtor filed an application to participate (the “Short-Form Application”). As part of its Short-Form Application, the Debtor declared, under penalty of perjury, that it was a

³⁶ See e.g. Reardon FCC Deposition Transcript (Exhibit G), at pp. 17:11-12, 72:1-5, 76:6-14, 81:4-11, 87:21-22, 183:12-19; Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 52-53; Confirmation Hearing Transcript Vol. II (Exhibit J), at p. 33:10-20.

³⁷ Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 146:15-25, 147:1-3; Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 43:11-25, 44:1-25, 45:1-12. As such, if any of those Site-Based Licenses have automatically terminated or automatically terminate, the frequencies covered did or will automatically revert to SkyTel. See 47 C.F.R. § 80.385(c).

³⁸ See generally HDO, at ¶¶ 9, 12, 13; Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 82:19-23, 179:8-19; Confirmation Hearing Transcript Vol. II (Exhibit J), at p. 33; Reardon FCC Deposition Transcript (Exhibit G), at p. 183: 16-19.

³⁹ 47 C.F.R. § 1.2110(a); see also 47 U.S.C. § 309(j).

⁴⁰ 47 C.F.R. § 1.2110(f)(2).

⁴¹ 47 C.F.R. § 1.2110(f)(2)(i).

⁴² See *Public Notice; Auction of Automated Maritime Telecommunications Systems Licenses Schedules for August 3, 2005* (Release No. DA 05-1047), 20 FCC Rcd. 7811, 2005 FCC LEXIS 2342 (April 21, 2005) (the “Public Notice”).

“designated entity” eligible for a 35% bidding credit based on its status as a “very small business.”⁴³

19. When Auction 61 concluded, the Debtor was declared the high bidder on certain of the subject licenses (referred to herein as the Geographic Licenses).⁴⁴ As to each of those licenses, the Debtor and SkyTel were the only bidders, and the margins between the Debtor’s and SkyTel’s highest bids were well within the scope of the Debtor’s 35% “very small business” credit.⁴⁵

20. On November 14, 2005, SkyTel filed a Petition to Deny the Debtor’s post-auction long-form application, arguing in part that the Debtor had misrepresented its “designated entity status” in its Short-Form Application.⁴⁶ The Wireless Telecommunications Bureau (“WTB”) found that the Debtor had contravened the “spousal affiliation” provision in 47 C.F.R. § 1.2110(c)(5)(iii)(A) by failing to include Donald DePriest’s (husband of the Debtor’s main principal, Sandra DePriest) interests and revenues in its designated entity showing,⁴⁷ and reduced the Debtor’s bidding credit from 35% to 25% and ordered the Debtor to pay the difference.⁴⁸

⁴³ See HDO, at ¶ 9.

⁴⁴ See FCC AMTS Auction #61, Final Report (available at http://wireless.fcc.gov/auctions/61/charts/61press_1.pdf); see also Public Notice - Auction of Automated Maritime Telecommunications Systems Licenses Closes (Release No. DA05-2316), 20 FCC Rcd 13747, 2005 FCC Lexis 4686 (Aug. 23, 2008); Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 33-34.

⁴⁵ This information can be viewed by visiting the following link: <http://wireless.fcc.gov/auctions/61>, following the link captioned “View Auction Results,” and following the links for the license names in the left-most column. See also Public Notice - Auction of Automated Maritime Telecommunications Systems Licenses Closes (Release No. DA05-2316), 20 FCC Rcd 13747, 2005 FCC Lexis 4686 (Aug. 23, 2008).

⁴⁶ See HDO, at ¶ 13; Maritime Commcn’s/Land Mobile, LLC, Petition to Deny Application FCC File No. 0002303355 at 3 (filed Nov. 2005) (available at <https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=1942310372&attachmentKey=18069319&attachmentInd=applAttach>).

⁴⁷ *Id.* at ¶ 14.

⁴⁸ *Id.* at ¶ 17.

The WTB thereafter granted the Debtor's long-form applications and awarded it the Geographic Licenses.⁴⁹

21. However, based on "lingering questions" about the Debtor's entitlement to a bidding credit in Auction 61 and the Debtor's continued failures to accurately disclose the interests of Donald DePriest (questions and failures which are discussed in detail in the HDO), the WTB referred the matter to the EB for investigation.⁵⁰

22. On April 19, 2011, and based on the EB investigation, the Commission issued the HDO, making certain factual findings and designating numerous issues to be determined in a show cause hearing, EB Docket No. 11-71 (the "Show Cause Hearing") which remains pending before an Administrative Law Judge ("ALJ").⁵¹ As referenced above, among the issues to be determined are whether the Debtor "is qualified to be and to remain a Commission licensee," whether the Commission should revoke any or all of the Debtor's alleged licenses, and whether certain of the Debtor's alleged licenses have cancelled or terminated automatically for lack of construction or permanent discontinuance of operation.⁵²

The New Jersey Litigation⁵³

23. On February 18, 2011, SkyTel filed its *Second Amended Complaint for Injunctive Relief and Damages* against the Debtor, Mobex, and others in the United States District Court for the District of New Jersey, alleging (among other things) that the defendants conspired to restrain trade in violation of the Sherman Act⁵⁴ by obtaining and "warehousing" site-based

⁴⁹ *See id.*

⁵⁰ *See id.*, at ¶ 23; *see also id.*, at ¶¶ 10-12, 15-16, 18-22, 24-26.

⁵¹ *Id.*, at pp. 28-30.

⁵² *See* HDO, at ¶¶ 1-2, ¶ 61, and p. 28.

⁵³ For a more detailed description of the ongoing New Jersey Antitrust Litigation, and the likelihood of SkyTel's success on the merits therein, see Memorandum By James Ming Chen, Legal Expert, Dkt. # 805-5.

⁵⁴ 15 U.S.C. §§ 1, 2.

licenses (including the Site Based Licenses allegedly acquired from Mobex) to increase the economic value of such licenses while decreasing the economic value of co-channel geographic licenses (the “New Jersey Litigation”).⁵⁵ If resolved in SkyTel’s favor, the New Jersey Litigation could result in, among other things, substantial money damages against the Debtor as well as potential revocation of all the Licenses by the District Court under 47 U.S.C. § 313, with no FCC action or consent required.⁵⁶

The Debtor’s Chapter 11 Bankruptcy Case

24. On August 1, 2011, approximately four (4) months after the FCC issued the HDO, the Debtor filed a voluntary Chapter 11 petition in the Bankruptcy Court (the “Petition”).⁵⁷ The next day⁵⁸, one of the Debtor’s principals, John Reardon, called a customer regarding the “good news” and left the following voicemail:

Hey Chris. I actually have some interesting news to share with you. I think it’s good news, but it doesn’t sound like it. We filed chapter 11 yesterday in [the] Northern District of Mississippi in Federal Court. And what that does is it stops the hearing at the FCC from taking place and allows the bankruptcy judge to essentially tell the FCC to approve the transactions that are pending [i.e., the pending asset purchase agreements between the Debtor and various counterparties such as CoServ, with whom “Chris” worked] and then the money would just go into an escrow account with the bankruptcy court and they would pay out our lenders. The benefit of that is innocent third parties such as CoServ get their spectrum and are not injured as a result of any wrong doing by our former owner Sandra DePriest and her husband. She and her husband just basically walked away and filed chapter 11 yesterday⁵⁹

⁵⁵ See Second Amended Complaint for Injunctive Relief and Damages, *Warren Havens et al v. Mobex Network Servs., LLC, et al*, Civil Action No. 2:11-cv-00993 (KSH) (D.N.J, filed Feb. 18, 2011) (Dkt. # 1).

⁵⁶ See 47 U.S.C. § 313. The Bankruptcy Court lifted the stay so as to allow the New Jersey Litigation to go forward for all purposes as to the Debtor, through final judgment and all appeals. See Dkt. #373.

⁵⁷ See Petition, Dkt. # 1.

⁵⁸ Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 131:13.

⁵⁹ See SkyTel’s Objection, Dkt. #806 at p. 51 n. 223. This voicemail was played into the record at the Confirmation Hearing (see Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 131:7 of the “uncorrected” transcript), and a transcription thereof was entered into evidence at the Confirmation Hearing as SkyTel Exhibit 2. See **Exhibit I** hereto.

25. Eventually, on September 25, 2012, the Debtor filed the Disclosure Statement⁶⁰ and Plan.⁶¹ Under the Plan, and as detailed in the Disclosure Statement, two proposals were put forth: one by Choctaw and one by CTI.⁶² Each proposal essentially provided that the Debtor would seek FCC approval(s) to transfer the Licenses -- which constitute substantially all of the Debtor's purported assets -- to either Choctaw or CTI, and that, after obtaining the necessary approval(s), Choctaw or CTI would then sell the Licenses and use the proceeds to pay creditors as outlined in the Plan. Before the Confirmation Hearing, however, Council Tree withdrew its proposal.⁶³

26. Choctaw Telecommunications, LLC is an Alabama Limited Liability Company, formed solely to facilitate efforts to obtain the Licenses through the Bankruptcy Case. The members of Choctaw Telecommunications, LLC are Collateral Plus Fund I, LLC ("Collateral Plus"); Watson and Downs Investments, LLC ("W&D"); Robert H. Hollis, III ("Hollis"); and Patrick Trammell ("Trammell") (collectively, the "Choctaw Members"). The Choctaw Members were creditors of the Debtor -- specifically, Trammell was an unsecured creditor and Collateral Plus, Hollis, and W&D were secured creditors.⁶⁴

27. Three Choctaw Members are also members of the debtor-in-possession lender, Southeastern Commercial Finance, LLC (the "DIP Lender").⁶⁵ Those members are W&D member John H. Watson ("Watson"), Hollis, and Trammell.⁶⁶ Trammel is also the DIP Lender's

⁶⁰ See Disclosure Statement, Dkt. #668.

⁶¹ See Plan, Dkt. #669.

⁶² See e.g. Disclosure Statement, Dkt. #668, at p. 18.

⁶³ See CTI Notice of Withdrawal of Offer, Dkt. #842.

⁶⁴ See Choctaw Proposal, Dkt. #668-5, p.1.

⁶⁵ See Choctaw Proposal, Dkt. #668-5, p. 1.

⁶⁶ See Choctaw Proposal, Dkt. #668-5, p.1.

managing member,⁶⁷ and Trammell, Watson, and Hollis are collectively the sole members of the DIP Lender's Board of Managers.⁶⁸ From 1996 until June of 2012,⁶⁹ Donald DePriest held a 10.52% membership interest in the DIP Lender.⁷⁰

28. Further connections between Donald DePriest and certain Choctaw Members exist.⁷¹ For example, Donald DePriest was at one time the Chairman of MCT Corp ("MCT"), and Watson and Trammell both made minimal equity investments in MCT in 1998.⁷² Further, Lucius Burch, who holds an 11% membership interest in Collateral Plus, served on MCT's Board of Directors.⁷³

29. Under the Choctaw Proposal, the Choctaw Members assigned their respective claims to Choctaw Telecommunications, LLC.⁷⁴ And, in exchange for and in satisfaction of Choctaw Telecommunication, LLC's claims against the Debtor, the Plan proposes that the Debtor will transfer the Licenses to Choctaw Holding, LLC ("Holding" -- a subsidiary of Choctaw Telecommunications, LLC), subject to and upon FCC approval.⁷⁵ The Plan provides that, upon confirmation, Choctaw and the Debtor will jointly seek such FCC approval.⁷⁶

30. Despite the Debtor and Choctaw's intentions in this regard, and as alluded to above, it is the FCC's standard policy not to consider a licensee's application to assign a license until *after* the FCC first determines that the licensee has not forfeited its authorization.⁷⁷ This is

⁶⁷ See Choctaw Proposal, Dkt. #668-5, p.1.

⁶⁸ See Choctaw Proposal, Dkt. #668-5, at p.1.

⁶⁹ See *generally* Confirmation Hearing Transcript Vol. I (Exhibit H), at p. 188:19-20, 196:11-17.

⁷⁰ See Choctaw Proposal, Dkt. #668-5, at p. 2.

⁷¹ For a detailed chart of the intertwining connections between Choctaw, the DePriests, and the Debtor, see The CTI Proposal, Dkt. # 688-8, at pp. 22-23.

⁷² See Choctaw Proposal, Dkt. #668-5, at p.2.

⁷³ See Choctaw Proposal, Dkt. #668-5, at pp. 2-3.

⁷⁴ See Choctaw Proposal, Dkt. #668-5, at p.3.

⁷⁵ See *e.g.* Plan, Dkt. #669, at p. 10; see Choctaw Proposal, Dkt. #668-5, at p. 3.

⁷⁶ See *e.g.* Plan, Dkt. #669, at p. 17.

⁷⁷ *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

referred to as the “*Jefferson Radio*” policy, which the Commission has more recently noted “precludes consideration of license assignment applications where a character issue has been resolved against the seller or is pending.”⁷⁸ And, as set forth above, character issues are currently pending against the Debtor in the Show Cause Hearing: thus, under the general *Jefferson Radio* policy, the Debtor could not normally assign any of its Licenses to Choctaw unless and until the FCC has ruled in the Debtor’s favor in the Show Cause Hearing.

31. There is, however, a limited, *extraordinary*⁷⁹ exception to the *Jefferson Radio* policy which has been applied under certain circumstances and which the Debtor has asserted is applicable to the Licenses. Specifically, under the FCC’s “*Second Thursday* exception,” the Commission will, in certain circumstances where a licensee is in bankruptcy:

[W]eigh potential benefits that could flow to the wrongdoer from assignment of a Commission license against the equitable considerations in favor of [any] innocent creditors. [Assuming the extraordinary exception otherwise applies,] [t]he Commission will grant the assignment “only if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.”⁸⁰

32. The crux of the Debtor’s Plan is that, by virtue of the pending bankruptcy, the Debtor and Choctaw might be able to obtain *Second Thursday* relief from the FCC and, as a result, obtain the necessary FCC approvals required to assign the Licenses to Choctaw so that the Plan can then move towards consummation.⁸¹

33. SkyTel, however, contends initially that neither the Debtor nor Choctaw qualify for extraordinary *Second Thursday* relief. SkyTel further contends that, even if the Debtor and

⁷⁸ *In re Mt. View Communs., Inc. et al.*, 24 FCC Rcd. 13516, 13519 (2009).

⁷⁹ *See e.g. In re KOZN(FM)*, 1990 FCC LEXIS 2379, Report No. DC-1126, 85-397 (FCC April 30, 1990).

⁸⁰ *In re Floyd*, 26 FCC Rcd. 5993, 5994–95 (2011) (quoting *In re Second Thursday Corp.*, 22 F.C.C.2d 515, 516 (1970)).

⁸¹ *See e.g.* Plan, Dkt. #669, at pp. 10, 11, 17, 18; *see also* Choctaw Proposal, Dkt. #668-5, at pp. 3-4; *see* Disclosure Statement, Dkt. #668, at p. 19.

Choctaw could obtain such relief, that would be insufficient to allow any of the Licenses to be transferred.

34. Indeed, in its Objection, SkyTel objected to confirmation of the Plan arguing, among other things, that the Plan is not feasible under 11 U.S.C. § 1129(a)(11) of the Bankruptcy Code (the “Code”) for numerous reasons.⁸² The Plan’s success, as written, depends on the FCC approving the assignment of the Licenses to Choctaw under *Second Thursday*, and, as SkyTel contended in its Objection and currently contends in the Confirmation Order Appeal, the Debtor failed to establish by a preponderance of the evidence that such success was “reasonably assured.”⁸³ As set forth in detail in the Objection and below, SkyTel contended, and still contends, among other things, that the narrow *Second Thursday* exception does not apply to the Debtor’s case.⁸⁴

35. In addition, SkyTel contended in its Objection, as it currently contends on appeal, that, even if *Second Thursday* relief is somehow obtained, the Plan remains unfeasible because there would still be numerous significant and material hurdles to the Debtor transferring the Licenses to Choctaw to effectuate the Plan.

36. For example, *Second Thursday* relief does not apply to terminations of the Site-Based Licenses involved in the Show Cause Hearing (i.e., all the Licenses the Debtor allegedly acquired from Mobex). Rather, it can only potentially apply to revocations of the Geographic Licenses involved in the Show Cause Hearing. As recognized in the HDO, including in Issue (g) thereof (hereinafter, “Issue G”), a site-based license authorization *terminates automatically* by operation of law, and without further affirmative FCC action required, if the licensee fails to

⁸² See SkyTel’s Objection, Dkt. #806., at pp. 2, 32-48.

⁸³ See SkyTel’s Objection, Dkt. #806, at pp. 32-37.

⁸⁴ See e.g. SkyTel’s Objection, Dkt. #806, at pp. 34-37; see also SkyTel Insert into Disclosure Statement, Dkt. #668-10.

timely construct or operate the station.⁸⁵ As such, obtaining *Second Thursday* relief would not enable the Debtor to transfer any Site-Based Licenses to Choctaw, particularly to the extent the licenses have terminated already (including prior to the filing of the Bankruptcy Case).⁸⁶ And significantly, the FCC's counsel noted this at the Confirmation Hearing, acknowledging that Issue G has to be decided before the possibility of *Second Thursday* relief is even considered.⁸⁷

37. As a further example, *Second Thursday* relief would have no effect on SkyTel's other legal proceedings which are outside of the Show Cause Hearing, and which evidence SkyTel's claim of superior rights in and to the Licenses -- specifically: (a) SkyTel's Application for Review (the "Application for Review") pending before the FCC (at the full Commission level, with associated petitions based on new facts at the Wireless Bureau level),⁸⁸ which claims the rights to all of the Geographic Licenses and is based, to commence with, on the Licenses issued to the Debtor in Auction 61 being void ab initio; and (b) the New Jersey Litigation which, as discussed above, could result in, among other things, revocation of all the Licenses by the District Court under 47 U.S.C. § 313, with no FCC action or consent required.

38. Notwithstanding SkyTel's objections, the Bankruptcy Court confirmed the Plan as to the Choctaw Proposal and entered its Confirmation Order on January 11, 2013.⁸⁹ SkyTel timely appealed.⁹⁰

⁸⁵ See HDO, at p. 6 n. 21, at ¶ 61, and at p. 28.

⁸⁶ Rather, the frequencies covered by any such terminated licenses would automatically revert to SkyTel. See 47 C.F.R. § 80.385(c).

⁸⁷ See HDO, at ¶ 62(g). See also Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 170:18-25, 171: 1-19.

⁸⁸ The Application for Review, filed 04/10/2007, and associated petitions are all publicly accessible on the FCC public licensing database called "ULS" under the Debtor's application for licenses resulting from Auction 61, application File Number 0002303355, at this link: <http://wireless2.fcc.gov/UlsApp/ApplicationSearch/applAdminPleadings.jsp?applID=3612537>.

⁸⁹ See Confirmation Order, Dkt. #s 973, 980.

⁹⁰ See Notice of Appeal, Dkt. #999.

QUESTIONS PRESENTED ON APPEAL

39. In the Confirmation Order Appeal, SkyTel raises the following issues:⁹¹

- a. Whether the Bankruptcy Court erred when it concluded that the Debtor's Plan satisfies the "feasibility" requirements of 11 U.S.C. § 1129(a)(11).
- b. Whether the Bankruptcy Court erred in concluding that the Plan satisfies the "good faith" requirements of 11 U.S.C. § 1129(a)(3).
- c. Whether the Bankruptcy Court erred in concluding that the Debtor complied with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. § 1129(a)(2), despite the fact that, among other things, the Debtor unilaterally abandoned certain site-based Licenses without Notice to Creditors or authorization from the Bankruptcy Court.
- d. Whether the Bankruptcy Court erred in concluding that the Plan complied with all applicable provisions of the Bankruptcy Code as required by 11 U.S.C. § 1129(a)(1), despite the fact that, among other things, the Plan provides that the Debtor will, as of the effective date of the Plan, "assume and assign to "Choctaw" "all . . . future contracts to sell FCC Spectrum Licenses," without the Bankruptcy Court first making a determination upon notice and a hearing that each of the elements of 11 U.S.C. § 363 have been complied with and that any proposed "future contract[] to sell FCC Spectrum Licenses" can otherwise be approved pursuant to applicable law.
- e. Whether the Bankruptcy Court erred in concluding in the Confirmation Order that "Choctaw" is a good faith purchaser as contemplated by 11 U.S.C. § 363(m).
- f. Whether the Bankruptcy Court erred in confirming this Plan that defines "consummation" in a manner that, especially when read in conjunction with the Plan's definition of "effective date" and the sentence that follows the Plan's definition of "effective date," is contrary to the Bankruptcy Code's definition of "substantial consummation" set forth in 11 U.S.C. § 1101(2).
- g. Whether the Bankruptcy Court erred in confirming the Plan without specifically determining whether the FCC spectrum licenses proposed therein to be transferred are in fact property of the estate, in light of the pending FCC Proceedings and New Jersey District Court Litigation referred to in the Confirmation Order, which are related to determining what, if any, interest the Debtor has or may have in those licenses, or otherwise.

⁹¹ See Appellant's Designation of Items to be Included in the Record on Appeal and Statement of the Issues to be Presented (the "Designation/Statement"), Dkt. #1019, at p. 11-12.

- h. Whether the Bankruptcy Court erred when it overruled SkyTel's objection to Robert J. Keller testifying as an "expert in the area of the FCC communications law, with special emphasis on Second Thursday doctrine as it applies to this case."
- i. Whether the Bankruptcy Court erred when it overruled SkyTel's objection to the admission of Robert J. Keller's "expert report" into evidence.⁹²

RELIEF SOUGHT

40. SkyTel requests that this Court certify SkyTel's Appeals of the Confirmation Order and Keller Order for direct appeal to the Fifth Circuit under 28 U.S.C. § 158(d) and Bankruptcy Rule 8001(f). On Appeal, SkyTel seeks to reverse the appealed orders based on the issues set forth above.

ARGUMENT

A. The Standards for Direct Appeal

41. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress amended 28 U.S.C. 158(d) to provide for direct appeals of final bankruptcy court orders.⁹³ According to the Fifth Circuit, "[t]he twin purposes of the [amendment] were to expedite appeals in significant cases and to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy."⁹⁴ Additionally, Congress enacted §

⁹² In the Keller Order Appeal, SkyTel raises the following issue: "Whether the Bankruptcy Court erred when it denied *SkyTel's Motion to Exclude Testimony of the Debtor's Alleged Expert, Robert J. Keller* and when it relatedly overruled SkyTel's objection to Robert J. Keller testifying as an 'expert in the area of FCC communications law, with special emphasis on Second Thursday doctrine as it applies to this case.'" See Appellant's Designation of Items to be Included in the Record on Appeal and Statement of the Issues to be Presented (the "Designation/Statement"), Dkt. #1031, at p. 3.

⁹³ 28 U.S.C. § 158(d)(2); See also *Jaffe v. Samsung Elecs. Co. (In re Qimonda AG)*, 470 B.R. 374, 382-83 (E.D. Va. 2012) (citing H.R. Rep. No. 109-31(I), at 148 (2005), as reprinted in 2005 U.S.C.C.A.N. 88.206)).

⁹⁴ *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d , 241-242 (5th Cir.) (citing H.R. Rep. No. 109-31 pt. I, at 148 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 206); See also *In re Qimonda AG*, 470 B.R. at 382-83; Laura B. Bartell, *The Appeal of Direct Appeal — Use of the New 28 U.S.C. § 158(D)(2)*, 84 Am. Bankr. L.J. 145, 184-186 (2010)).

158(d)(2) “to address ‘the time and cost factors attendant to the present appellate system’”⁹⁵ and “to provide a quicker and less costly route to resolve issues that will likely end up in the court of appeals”⁹⁶

42. Section 158(d)(2)(A) provides that:

The appropriate court of appeals shall have jurisdiction [over final orders] if the bankruptcy court [or] the district court . . . acting on its own motion or on the request of a party to the judgment, order, or decree . . . certif[ies] that—(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, *or* involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.⁹⁷

43. Section 158(d)(2)(A)(i)-(iii) sets forth four, not three, independent grounds for direct certification.⁹⁸ This is so, because “the first subsection contains two separate and distinct grounds for certification: (1) whether there is controlling precedent at the circuit or Supreme Court level; *or* (2) whether the issue relates to a matter of public importance.”⁹⁹ The remaining two grounds are whether the order involves a question of law requiring resolution of conflicting decisions and whether an immediate appeal from the order may materially advance the progress

⁹⁵ *In re Qimonda AG*, 470 B.R. at 382-83, n. 8 (citing H.R. Rep. No. 109-31(1), at 148 (2005), as reprinted in 2005 U.S.C.C.A.N. 88.206) (Section 158(d)(2) enacted to address “the time and cost factors attendant to the present appellate system” as well as the fact that “decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value.”);

⁹⁶ *In re Qimonda AG*, 470 B.R. at 389.

⁹⁷ See 28 U.S.C. § 158(d)(2)(A)(i)-(iii) (emphasis added).

⁹⁸ *In re MPF Holding US LLC*, 444 B.R. 719, 725 n. 7 (Bankr. S.D. Tex. 2011); see also *In re Qimonda AG*, 470 B.R. at 386-87.

⁹⁹ *In re MPF Holding US LLC*, 444 B.R. at 725 n. 7.

of the case or proceeding in which the appeal is taken.¹⁰⁰ Certification is warranted where any one of these four grounds is met.

B. The Grounds for Certification

1. The Confirmation Order involves a question of law as to which there is no controlling decision of the Fifth Circuit or of the Supreme Court of the United States.

44. The first ground for certification under § 158(d)(2)(A)(i), is whether the Confirmation Order involves a question of law as to which there is no controlling decision of the Fifth Circuit or of the Supreme Court of the United States.¹⁰¹ This ground is met here as to the issue regarding the Confirmation Order’s finding that “Choctaw is a good faith purchaser *as contemplated by 11 U.S.C. § 363(m).*”¹⁰²

45. Under the Plan and the Disclosure Statement, including the Choctaw Proposal, the transfer/assignment of the Licenses to Choctaw’s subsidiary, Holdings, is to take place *through the chapter 11 Plan*, subject to and upon FCC approval.¹⁰³ The Plan proposes a transfer of assets *through a plan of reorganization* -- as contemplated under § 1123(a)(5)(B) -- and not through a § 363 sale. Neither the Plan nor the Disclosure Statement provide that the transfer/assignment is to take place under § 363 of the Code -- indeed, the Confirmation Hearing record *is completely devoid of any reference to § 363 or 363(m) as it relates to the proposed transfer/assignment.*

46. While, at the end of the Confirmation Hearing, the Court made a finding on the record, at the request of the Debtor, that “Choctaw” was a “good faith purchaser,” the Debtor *never* indicated in the evidence presented or in the arguments made at the Confirmation Hearing that the proposed transfer/assignment was to take place under § 363 or that § 363(m) applied.

¹⁰⁰ 28 U.S.C. § 158(d)(2)(A)(ii)-(iii).

¹⁰¹ 28 U.S.C. § 158(d)(2)(A)(i).

¹⁰² See Confirmation Order, Dkt. #s 973, 980, at p. 5 (emphasis added); Designation/Statement, Dkt. #1019, at p. 12.

¹⁰³ See *e.g.* Plan, Dkt. #669, at pp. 10, 16.

Days after the Confirmation Hearing, however, the Bankruptcy Court included in the Confirmation Order, at the Debtor and Choctaw's request and over SkyTel's objection, "that Choctaw is a good faith purchaser *as contemplated by 11 U.S.C. § 363(m)*."¹⁰⁴

47. This finding is potentially significant. Section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith"¹⁰⁵ Accordingly, under § 363(m) -- assuming it properly applies here -- there is a possibility that SkyTel's Appeals could become statutorily moot at some point, at least in part.

48. SkyTel has appealed the belated inclusion of § 363(m) in the Confirmation Order. And, because there is no controlling law as to whether a Confirmation Order may belatedly include such a reference, or whether a transfer/assignment of assets through a reorganization plan even properly constitutes a sale under § 363(b) or (c), certification is proper under § 158(d)(2)(A)(i).

49. The Fifth Circuit addressed this issue in *In re Texas Extrusion Corp.*, but did so in dicta and decided the case on other grounds.¹⁰⁶ In that case, a bankruptcy court's confirmation order provided that the debtors would sell assets of the estate to a third party under 11 U.S.C. § 363.¹⁰⁷ On appeal, those objecting to confirmation argued that the reference was improper because § 363 had never been mentioned in the disclosure statement, plan, or at the confirmation hearing.¹⁰⁸ The objectors argued that the belated reference to § 363 -- made at the debtor's

¹⁰⁴ See Confirmation Order, Dkt. #s 973, 980, at p. 5 (emphasis added).

¹⁰⁵ 11 U.S.C. § 363(m).

¹⁰⁶ *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988).

¹⁰⁷ *Id.* at p. 1164.

¹⁰⁸ *Id.*

request -- was done “in order to prevent the appellants from unwinding the sale to [the third party] in the event of a reversal of the confirmation of the Plan on appeal.”¹⁰⁹

50. The Fifth Circuit first noted that it had “doubt as to whether the application of 11 U.S.C. § 363 was proper . . . [because] Section 363 is part of the Bankruptcy Code dealing with administrative powers.”¹¹⁰ Indeed, both §§ 363(b) and (c) -- to which § 363(m) is applicable -- “deal with the authority of a bankruptcy trustee to use, sell, or lease property of the estate.”¹¹¹ According to the Court, “[t]here is a definite implication that these provisions concern the trustee’s authority during the *administration* of the estate and not at the *final disposition* of the property of the estate pursuant to a plan of reorganization.”¹¹² But, in concluding, the Court “decline[d] . . . to rule on the propriety of the application of 11 U.S.C. § 363 to the sale of property pursuant to a plan of reorganization” because the Court decided the case on a different, unrelated issue.¹¹³

51. In addition, at least one court within the Fifth Circuit has recognized that a § 363 sale is an entirely different procedure than a sale or transfer/assignment under a Chapter 11 plan of reorganization. In *In re Gulf Coast Oil Corp.*, the Bankruptcy Court for the Southern District of Texas explained that:

There are two sections of the Bankruptcy Code applicable in chapter 11 that explicitly authorize the sale of property. Section 363(b) authorizes a trustee to sell property of the estate outside the ordinary course of business. Section 1123 provides that a chapter 11 plan may include provisions (i) for transfer of all or any part of the property of the estate, and (ii) for sale of all or any part of the property of the estate. . . . The Bankruptcy Code does not provide any explicit guidance to determine when § 363(b) is the appropriate procedure and when § 1123 is the appropriate procedure.¹¹⁴

¹⁰⁹ *Id.* at pp. 1165-65.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

¹¹³ *Id.*

¹¹⁴ *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 414-15 (Bankr. S.D. Tex. 2009).

52. Based on the foregoing, the belated inclusion of § 363(m) in the Confirmation Order involves a question of law as to which there is no applicable controlling decision. Thus, certification of SkyTel’s appeal is proper under § 158(d)(2)(A)(i).

2. *The Confirmation Order involves matters of public importance.*

53. The second ground for certification under § 158(d)(2)(A)(i), is whether the Confirmation Order involves a matter of public importance.¹¹⁵ This ground has been said to be met where the appeal impacts the public at large¹¹⁶ and the issues “transcend the litigants.”¹¹⁷ This ground has also been said to be met where the issues include either: (1) “the applicability of nonbankruptcy law to matters arising in a bankruptcy case”;¹¹⁸ or (2) issues that “could impact . . . vital interests in the community.”¹¹⁹ This ground is met here for at least three reasons.

54. First, the Confirmation Order Appeal presents mixed questions of bankruptcy law and federal communications law which involve matters of public importance.

55. Substantially all of the Debtor’s alleged assets are AMTS spectrum licenses regulated by the FCC. As Congress has made clear, such spectrum belongs to no individual; rather, it belongs to the public.¹²⁰ Congress, by enacting the FCA, authorized the FCC to license such spectrum to lawful high bidders who are, by assumption, to use spectrum only in the

¹¹⁵ 28 U.S.C. § 158(d)(2)(A)(i).

¹¹⁶ *In re Qimonda AG*, 470 B.R. at 387 (citing Collier on Bankruptcy ¶ 5.06[4][b] (Alan N. Resnick & Henry J. Somme eds., 16th ed.)).

¹¹⁷ *In re MPF Holding US LLC*, 444 B.R. at 726 (citing Collier on Bankr. at ¶ 5.06[5][b]).

¹¹⁸ *Id.*

¹¹⁹ *In re Qimonda AG*, 470 B.R. at 386-87 (citing Collier on Bankr. at ¶ 5.06[4][b]) (also recognizing that an appeal can involve matter of public importance even where it does not involve question of law that is itself matter of public importance; as result, appeal may be certified as matter of public importance either because it involves important legal issues or important practical ramifications).

¹²⁰ *See e.g.* 47 U.S.C. § 301 (“It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”).

public's best interests.¹²¹ Indeed, the FCC's standard policy (discussed in more detail above) is to prohibit the assignment of licenses where the assignor's character and qualifications have been called into question -- for example, where there is a question about whether the licensee has acted or will act in the public's best interest.¹²² And this policy applies regardless of any alleged "blameless character of the proposed ultimate transferee."¹²³

56. Further, one of the policies behind the Bankruptcy Code is to help honest but unfortunate debtors achieve a fresh start. This policy is turned on its head when dishonest debtors seek to use the Code to escape the consequences of their misbehavior and to cheat others out of the superior rights they claim in and to alleged Debtor assets.

57. In this case, the chapter 11 Plan confirmed by the Bankruptcy Court purports to facilitate the transfer of the subject Licenses from an allegedly dishonest debtor, whose character has clearly been called into question by the FCC, to a new entity comprised of plan proponents

¹²¹ See e.g. 47 U.S.C. § 307(a) ("The [FCC], if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.") (emphasis added); 47 U.S.C. § 307(c) ("[A] renewal of such license may be granted . . . if the [FCC] finds that public interest, convenience, and necessity would be served thereby."); 47 U.S.C. § 309(a) ("[T]he [FCC] shall determine, in the case of each application filed with it to which § 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application . . .").

¹²² See *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) ("It is the recognized policy of the [FCC] that assignment of broadcast authorization will not be considered until the [FCC] has determined that the assignor has not forfeited the authorization.") (citing *Broadcasting Service Organization*, 11 F.C.C. 1057, 1073, adopted en banc, 12 F.C.C. 260 (1947), aff'd, 337 U.S. 901 (1949), reversing 84 U.S. App. D.C. 152, 171 F.2d 1007; *G. A. Richards*, 14 F.C.C. 429, 430-31 (1950); *Tidewater Teleradio*, 24 Rad. Reg. (P & F) 653, 657 (1962).). See also *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (Jackson, J.); *In re Wallerstein*, 1 F.C.C.2d 91 (FCC 1965); *Crowder v. FCC*, 399 F.2d 569, 572 (D.C. Cir. 1968) ("Service in the public interest presupposes an intent to operate the broadcast facility as represented, for the duration of the license, under Commission supervision, honestly without concealment, and responsive to the broadcasting needs of the community and nation.").

¹²³ *In re Wallerstein*, 1 F.C.C.2d 91, 95 (FCC 1965) ("The apparently blameless character of the proposed ultimate transferee of control of Nevada Broadcasters' Fund, Inc., and, in turn, Television Co. of America, Inc.; is likewise irrelevant to the disposition of this proceeding once we have arrived at an adverse determination concerning the application for license renewal. If there is a failure to renew the license of KSHO-TV, Wallerstein will have no license to assign.").

with various intertwined relationships with the allegedly dishonest debtor.¹²⁴ Whether and to what extent the chapter 11 process should be allowed to be used to facilitate such a scheme, particularly in light of the fundamental communication and bankruptcy law policies discussed above which are implicated in that scheme, involves a matter of public importance and issues which transcend the litigants.¹²⁵ Therefore, certification of this appeal under § 158(d)(2)(A)(i) is proper.

58. Second, certification is warranted under § 158(d)(2)(A)(i) because the Bankruptcy Court's finding -- set forth in the Confirmation Order -- that the Plan was feasible under § 1129(a)(11) of the Code necessarily and directly involved "the applicability of nonbankruptcy law to matters arising in a bankruptcy case";¹²⁶ therefore, the Confirmation Order involves matters of public importance justifying direct certification.

59. Specifically, the success of the Plan, as it is written, ultimately depends on the FCC approving the assignment of the Licenses to Choctaw under *Second Thursday*.¹²⁷ But, as discussed herein and in greater detail in the Objection, there are many problems with the Plan's feasibility when considering feasibility in light of applicable federal communications law and bankruptcy law, as well as federal anti-trust law.

60. As an initial matter, the Debtor's character and qualifications as a license holder have been called into question by the FCC. Indeed, in the HDO, the FCC determined, among other things, that there are "substantial and material questions of fact as to whether [the Debtor]:

(i) violated the designated entity rules and received a credit on its obligations to the United States Treasury of approximately \$2.5 million to which it was not entitled;

¹²⁴ See e.g. CTI Proposal, Dkt. # 688-8, at pp. 22-23.

¹²⁵ *In re MPF Holding US LLC*, 444 B.R. at 726 (citing Collier on Bankr. at ¶ 5.06[5][b]).

¹²⁶ *Id.*

¹²⁷ See e.g. Plan, Dkt. #669, at pp. 10, 11, 17, 18; see also Choctaw Proposal, Dkt. #668-5, at pp. 3-4 see Disclosure Statement, Dkt. #668, at p. 19.

(ii) repeatedly made misrepresentations to and lacked candor with the [FCC] in connection with its participation in [Auction 61] and the claimed bidding credit;

(iii) failed to maintain the continuing accuracy and completeness of information furnished in its still pending long-form application; and

(iv) purports to hold authorizations that have cancelled automatically for lack of construction or permanent discontinuance of operation.¹²⁸

61. If the FCC were to ultimately find under communications law (whether in the Show Cause Hearing or otherwise) that the Debtor is unqualified to be and remain an FCC licensee, the FCC would very likely revoke all of the Licenses and the Debtor would have nothing to transfer to Choctaw to effectuate the Plan.¹²⁹ If the FCC finds, in connection with Issue G, that the Site-Based Licenses have terminated automatically by operation of law, then those licenses would be gone without any further affirmative FCC action required, and they could not be transferred to Choctaw to effectuate the Plan. Further, if the FCC resolves SkyTel's pending Application for Review in SkyTel's favor, and finds the Geographic Licenses to be void ab initio, then those Licenses could not be transferred to Choctaw to effectuate the Plan (rather, in SkyTel's view, they would have to be awarded to SkyTel¹³⁰). Finally, if the New Jersey Litigation -- which is based on federal anti-trust law -- is resolved in SkyTel's favor, it could potentially result in, among other things, the revocation of all the Licenses by the District Court under 47 U.S.C. § 313, with no FCC action or consent required.¹³¹ If that occurs, there would be no Geographic Licenses to be transfer to Choctaw to effectuate the Plan. Under bankruptcy law, the potential for these things to occur has to be factored into any feasibility analysis, and the

¹²⁸ See e.g. HDO, at ¶ 2.

¹²⁹ See e.g. HDO, at ¶¶ 1, 2. E.g. *Jefferson Radio Co.*, 340 F.2d at 781.

¹³⁰ See e.g. Dkt. #668-10, p. 3.

¹³¹ See 47 U.S.C. § 313.

likelihood of occurrence has to be determined by looking at federal communications law and, in the case of the New Jersey Litigation, federal anti-trust law.

62. The Debtor and Choctaw contended that the Plan was feasible because of *Second Thursday*,¹³² despite the FCC's standard policy under *Jefferson Radio*¹³³ and despite the numerous other feasibility problems which have been highlighted by SkyTel.

63. As noted above, however, *Second Thursday* is actually a narrow and extraordinary *exception* to the FCC's standard revocation policy:

Despite the general rule that an assignment of license will not be authorized during the pendency of a hearing involving the character qualifications of a licensee, the Commission will permit such upon a showing that alleged wrongdoers will derive no benefit, either directly or indirectly, from the sale or will derive only minor benefit which is outweighed by the equities in favor of innocent creditors.¹³⁴

Moreover, "[a]pplication of *Second Thursday* requires an ad hoc balancing of the possible injury to regulatory authority that might flow from wrongdoers' realization of benefit against the public interest in innocent creditors' recovery from the sales and assignment of the license to a qualified party."¹³⁵

64. And in any event, SkyTel contended at the Confirmation Hearing, and contends on Appeal: (a) that the Debtor and Choctaw will, in light of applicable communications, bankruptcy, and anti-trust law, face significant, material hurdles in attempting to obtain *Second Thursday* relief¹³⁶; and (b) that even if the Debtor and Choctaw could otherwise qualify for *Second Thursday* relief, that would, under applicable communications, bankruptcy, and anti-trust

¹³² See e.g. Disclosure Statement, Dkt. # 669, at p. 19; Plan, Dkt. # 669, at pp. 16-19, 28-29, 35.

¹³³ *Jefferson Radio Co.*, 340 F.2d at 781.

¹³⁴ *LaRose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974) (citing *In re Shell Broadcasting, Inc.*, 38 F.C.C.2d 929, 931 (1973)).

¹³⁵ *LaRose*, 494 F.2d at 1149.

¹³⁶ See SkyTel's Objection, Dkt. #806, at pp. 32-37; see also SkyTel's Insert into Disclosure Statement, Dkt. #668-10.

law, be insufficient -- for the reasons discussed above and in SkyTel's Objection¹³⁷ -- to allow the Licenses to be transferred; therefore, the Plan would remain unfeasible.

65. Regarding *Second Thursday*, it does not apply to this case because, among other reasons: (a) the Debtor entered bankruptcy for the primary purpose of escaping FCC regulations and obtaining *Second Thursday* relief;¹³⁸ (b) an alleged "wrongdoer" (Donald DePriest) will receive at least an indirect benefit under the Plan by virtue of being released from multiple personal guarantees;¹³⁹ (c) the proposed transferee (Choctaw) is connected with the Debtor and has been associated with the Debtor's operations;¹⁴⁰ (d) Choctaw is not an "innocent" creditor in that it had knowledge of the Debtor's impending troubles before the FCC;¹⁴¹ and (e) Choctaw stands to gain a potentially huge windfall in the event it obtains and sells the spectrum for more than the amount of the Debtor's debts.¹⁴² And, in any event, whether and how *Second Thursday*

¹³⁷ See e.g. SkyTel's Objection, Dkt. #806, at pp. 37-41; see also SkyTel's Insert into Disclosure Statement, Dkt. #668-10.

¹³⁸ See SkyTel's Objection, Dkt. #806 at p. 51 n. 223.

¹³⁹ See Confirmation Hearing Transcript Vol. I (Exhibit H), at pp. 127-129 (Donald DePriest executed multiple personal guarantees of debts of the Debtor, which were entered into evidence under seal at the Confirmation Hearing as SkyTel Exhibit 1); see HDO, at p. 3 (identifying Donald DePriest as a potential wrongdoer); see Confirmation Hearing Transcript Vol. II (Exhibit J), at pp. 138-141 (expert opining that *Second Thursday* not applicable because of, *inter alia*, guarantees); see *In re Family Broadcasting, Inc.*, 25 FCC Rcd 7591,7598 (2010) (considering personal guarantees in *Second Thursday* analysis); *In re Application of Capital City Commc'ns, Inc.*, 33 F.C.C.2d 703, 711 (1972) ("In our view, of particular and dispositive significance is the fact that stockholders charged with wrongdoing will be relieved of liability as guarantors on substantial obligations of [the debtor]." Therefore, "the principals of [the debtor] who are alleged to have engaged in wrongdoing will be relieved of their liability . . . which represents over 20% of the proposed purchase price [and] is far more than a 'minor' benefit. We expressly held in *Second Thursday*, where it appeared that alleged wrongdoers would receive direct and indirect benefits amounting to approximately 23% of the purchase price of the broadcast facilities involved therein, that the public interest would not be served by allowing the principals thereof 'to receive so large a share of the proceeds of the broadcast facilities until a hearing is held and they are absolved of any wrong-doing'. A like conclusion must be reached here since we find no substantial equities in favor of innocent creditors which outweigh the benefits to alleged wrongdoers.")

¹⁴⁰ See Choctaw Proposal, Dkt. #668-5, at pp. 1-3; see CTI Proposal, Dkt. #688-8, at pp. 22-23.

¹⁴¹ See Confirmation Hearing Transcript, Vol. II (Exhibit J), at pp. 123-131.

¹⁴² In this regard, SkyTel is not aware of a single case in which the FCC has applied *Second Thursday* relief to a group of FCC licenses whose value exceeds the value of the FCC determined "innocent" debt.

may apply in this case (and therefore to what extent the Plan was feasible in that respect) *has to be determined by applying nonbankruptcy law to matters arising in the Bankruptcy Case.*

66. In addition, even if *Second Thursday* relief is somehow obtained, the extent to which the other hurdles to any transfer of the Licenses pursuant to the Plan (e.g., the Application for Review, Issue G, the New Jersey Litigation, etc.) effect the feasibility of the Plan also *has to be determined by applying nonbankruptcy law to matters arising in the Bankruptcy Case.* For, these other hurdles exist independent of the revocation portion of the Show Cause Hearing, and cannot be resolved by *Second Thursday*.

67. Relatedly, nonbankruptcy law must also be applied -- at least in part -- when determining if the numerous contingencies on which the Plan is based render it impermissibly speculative and risky, and thus unfeasible.¹⁴³

68. It is clear from the foregoing that the feasibility of the Debtor's Plan is dependent on the Debtor's success before the FCC. And whether there exists "a reasonable assurance of [that] success"¹⁴⁴ -- as required by § 1129(a)(11)'s feasibility standard -- depends on the application of federal communications law and/or anti-trust to matters arising in the Bankruptcy Case and in connection with the Confirmation Order. Therefore, certification of this appeal under § 158(d)(2)(A)(i) is proper.

69. Third, certification is warranted under § 158(d)(2)(A)(i) because the ultimate treatment of FCC spectrum licenses, including the Licenses at issue in the Bankruptcy Case, impacts a "vital interest[] in [the] community" and the "public at large."¹⁴⁵ Accordingly, the

¹⁴³ See SkyTel's Objection, Dkt. #806, at pp. 38-39.

¹⁴⁴ *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988).

¹⁴⁵ *In re Qimonda AG*, 470 B.R. at 386-87 (citing Collier on Bankr. at ¶ 5.06[4][b]).

issues involved on appeal have practical ramifications beyond the Bankruptcy Case and “transcend the litigants.”¹⁴⁶

70. As noted above, spectrum belongs to the public, and Congress has authorized the FCC to license the public’s spectrum to lawful high bidders only where the “public convenience, interest, or necessity will be served thereby”¹⁴⁷ Accordingly, and as the FCC has repeatedly made clear,¹⁴⁸ the determination of future rights in and to licenses, such as the Licenses involved in the Bankruptcy Case, impacts a vital interests of the community and public.¹⁴⁹

¹⁴⁶ *In re MPF Holding US LLC*, 444 B.R. at 726 (emphasis added) (citing Collier on Bankr. at ¶ 5.06[5][b]; *In re Qimonda AG*, 470 B.R. at 386-87

¹⁴⁷ See 47 U.S.C. § 307(a) (“The [FCC], if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.”); 47 U.S.C. § 307(c) (“[A] renewal of such license may be granted . . . if the [FCC] finds that public interest, convenience, and necessity would be served thereby.”); 47 U.S.C. § 309(a) (“[T]he [FCC] shall determine, in the case of each application filed with it to which § 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application”); see also *In re Magnacom Wireless*, 503 F.3d 984 (recognizing that Congress directed the FCC in the FCA to license spectrum in a manner that furthers the public interest).

¹⁴⁸ See e.g. Federal Communications Commission, Planning & Negotiations Division International Bureau: Report on International Negotiations, Spectrum Policy and Notifications, 1999 FCC LEXIS 3577, at 69-70 (“Radio spectrum represents a vital, yet limited, resource. Effective spectrum management plays a crucial role in enabling people to communicate. Wireless communications serve to inform, entertain, educate and protect people around the world.”); *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 F.C.C. Rcd 12357, 12548 (FCC October 2, 2012) (“Along with licensed spectrum, unlicensed spectrum is a *vital* part of today’s -- and tomorrow’s -- spectrum ecosystem.”) (emphasis added). See also U.S. Government Accountability Office: Incentives, Opportunities, and Testing Needed to Enhance Spectrum Sharing, GAO-13-7 (Nov. 14, 2012) (“The propagation and popularity of smart phones, tablets, and other wireless devices has created an explosion in the demand for and use of more radio frequency spectrum to support services and data transmissions on these devices, particularly in dense, urban areas. Federal users -- mostly government agencies -- also require spectrum for national defense, homeland security, and other vital mission activities. To date, however, nearly all usable radio spectrum has been allocated either by the National Telecommunications and Information Administration (NTIA) within the Department of Commerce for federal government use or by the [FCC] for commercial and other nonfederal use. Therefore, virtually no “green fields” of spectrum are currently available to allocate to new uses or technologies. Going forward, this scarcity could have implications for our economy, our competitiveness in global markets, and the ability of government at all levels to meet its key missions.”);

¹⁴⁹ See *In re Qimonda AG*, 470 B.R. at 386-87 (citing Collier on Bankr. at ¶ 5.06[4][b]).

71. Because this Appeal involves the applicability of nonbankruptcy law and issues of public importance that will impact vital community interests, certification is proper under § 158(d)(2)(A)(i).

3. ***An immediate appeal from the Confirmation Order may materially advance the progress of the case.***

72. Finally, certification is proper under § 158 (d)(2)(A)(iii) because an immediate appeal from the Confirmation Order will “materially advance the progress of the case”¹⁵⁰ Under this prong, certification may be proper where the amount in controversy is high and “it is likely that the parties will eventually appeal the case to the Fifth Circuit.”¹⁵¹ Here, the Debtor contends that the assets of the estate are worth approximately \$46 million¹⁵² -- an amount SkyTel contends is very likely much higher -- and, absent direct review of these critically important issues, it is almost certain that the non-prevailing party before the district court would seek further review by the Fifth Circuit. Further, a final decision as to the Confirmation Order -- whether affirmance or reversal -- could allow the parties to either proceed with greater certainty before the FCC; or attempt devise a new, *feasible* Plan; or reach some other settlement. As such, certification to the Fifth Circuit will materially advance the progress of the case and conserve the resources of both the parties and the judiciary.

¹⁵⁰ 28 U.S.C. § 158(d)(2)(A)(iii).

¹⁵¹ *In re MPF Holding US LLC*, 444 B.R. 719, 727 (S.D. Tex. 2011) (Certification proper where, “[d]ue to the amount in controversy -- over \$25.0 million -- any decision by the by the District Court in this matter is very likely to be appealed to the Fifth Circuit.”); *But see Faulkner v. Kronman*, 2012 Bankr. LEXIS 436, *13-14 (Bankr. S.D. Tex. Jan 30, 2012).

¹⁵² See Amended Summary of Schedules and Financial Affairs, Dkt. #171, at p. 1. It should be noted, however, that the Debtor has changed its position on the value of its assets over the course of the Bankruptcy Case.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, SkyTel respectfully requests that this Court certify SkyTel's Appeals of the Confirmation Order and Keller Order for direct appeal to the Fifth Circuit under 28 U.S.C. § 158(d) and Bankruptcy Rule 8001(f). SkyTel further prays for general relief.¹⁵³

THIS the 12th day of March, 2013.

Respectfully submitted,

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¹⁵³ SkyTel asked the Debtor and others if they were amenable to making a joint request under 28 U.S.C. § 158(d)(2)(B)(ii), but the Debtor declined.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be filed via the Court's Electronic Case Filing System, which caused a copy to be served on all counsel and parties of record who have consented to receive ECF notification, including the following:

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